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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 714

ESTATE OF ELEANOR BUCHANAN TALBOTT, DEC.,
BRYAN CARVER, EXECUTOR,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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OPINION BELOW

The opinion of the U. S. Court of Appeals for the Fourth Circuit dated September 20, 1968 is unreported. It is printed in the Appendix. (A. 11.)

The opinion of the Tax Court dated June 14, 1967 is reported in 48 TC 271. It is printed in the Appendix. (A. 1.)

JURISDICTION

The judgment of the Court of Appeals was filed and entered on September 20, 1968. (A. 23.) There was no order respecting a rehearing or granting an extension of time within which to petition for certiorari. Jurisdiction

of this Court is invoked under Title 28, Sec. 1254(1), U.S.C.

QUESTIONS PRESENTED

Decedent created a trust and transferred the legal title of certain securities to it before March 4, 1931. The income was payable to her and her husband equally during their joint lifetime, to the survivor for life, and upon the survivor's death, the corpus was distributable to four remaindermen, or their issue. Decedent and her husband, or the survivor, together with one of the remaindermen, by written instrument could modify, alter, or revoke in whole or in part the trust and dispose of the trust fund. (A. 1-4.)

Decedent's husband died in 1935, the remainderman in 1937, and decedent in 1962. (A. 1, 4.)

The questions are:

1. Whether the word "transfer" in the limitation provision in Sec. 2036(b) has the same meaning as the word "transfer" in the general provision in Sec. 2036(a), IRC 1954.

2. Whether decedent made a transfer under which she retained the income for life, when she transferred the legal title of the securities to the trust prior to March 4, 1931, within the meaning of Sec. 2036(b).

3. Whether decedent made a transfer under which she retained the income for life, when the joint power of revocation in herself and her husband terminated as a result of his death in 1935, within the meaning of Sec. 2036(a).

STATUTES

(Internal Revenue Code Of 1954)

SEC. 2036 [as amended by Sec. 18(a), Revenue Act of 1962. P. L. 87-834, 76 Stat. 960].

TRANSFERS WITH RETAINED LIFE ESTATE.

(a) *General Rule.*—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—

(1) the possession or enjoyment of, or the right to the income from, the property, or

(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

(b) *Limitation on Application of General Rule.*—This section shall not apply to a transfer made before March 4, 1931; nor to a transfer made after March 3, 1931, and before June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516).

(26 U.S.C. 1964 ed., Sec. 2036.)

STATEMENT OF THE CASE

1. On July 5, 1923, decedent, of Baltimore, Maryland, as grantor, and Equitable Trust Company of New York, as trustee, executed a trust. She transferred the legal title of certain securities to the trust, when it was created in 1923, and of additional securities to it in 1929. (A. 1, 2, 4.)

2. The net income was payable to decedent and her husband, William M. Talbott, equally during their joint lifetime, in its entirety to the survivor for life, and upon

the death of the survivor the corpus was distributable to four remaindermen, of whom one was Charles F. Talbott, or their issue. (A. 3.)

3. The trust indenture empowered decedent and her husband, or the survivor of them, together with Charles F. Talbott, by written instrument to modify or alter in any manner, or revoke in whole or in part the trust and to direct the disposition of the trust fund or the portion thereof affected by such revocation. (A. 4.)

4. In 1932 and in 1933 decedent and her husband exercised the joint power and partially revoked the trust and withdrew certain securities from the trust fund. (A. 4.)

5. Decedent's husband died on November 15, 1935, Charles F. Talbott on March 6, 1937, and decedent on December 30, 1962. (A. 1, 4.)

6. On June 9, 1943 decedent attempted to revoke the trust to the extent of apportioning certain dividends to income and to principal of the trust fund. The Supreme Court of the State of New York held that she had no such power to revoke. (A. 4, 5.)

7. The Tax Court held that decedent made a transfer under which she retained the income for life when she transferred the legal title of the securities to the trust in 1925 and 1929; and that the transfer was made before March 4, 1931 within the meaning of Sec. 2036(b), IRC 1954. (A. 8, 10.) The Tax Court had jurisdiction under Secs. 6213, 6214, IRC 1954.

8. The Court below reversed the Tax Court and held that the transfer was made on November 15, 1935, when the joint power of revocation in decedent and her husband terminated as a result of his death; and that the transfer was made after March 3, 1931 within the meaning of Sec. 2036(a), IRC 1954. (A. 11, 18, 22.) The Court below had jurisdiction to review the decision of the Tax Court under Secs. 7482, 7483, IRC 1954.

REASONS FOR GRANTING WRIT

I

The Court Of Appeals Below Rendered A Decision In Conflict With Decisions Of the Courts Of Appeals For The Second And Third Circuits Regarding The Meaning Of The Word "Transfer" In Sec. 2036(b) IRC 1954, And In The Corresponding Limitation Provision Applicable To Sec. 811(c)(1)(B), IRC 1939.

The Court of Appeals followed *Smith* v. *U. S.*, (Ct. Cls., 1956), 139 F. Supp. 305, 49 AFTR 696, and *Studebaker* v. *U. S.*, (D. C. N. D. Ind., 1961), 195 F. Supp. 841, 8 AFTR 2d 6018, modified, 211 F. Supp. 263, 11 AFTR 2d 1829, which held that the limitation provision rendering Sec. 811(c) (1) (B), IRC 1939,* inapplicable to transfers made prior to March 4, 1931, referred only to irrevocable transfers. (A. 17.)

Thus, the Court below held that the word "transfer" has two different meanings in Sec. 2036—that the word "transfer" in Sec. 2036(a) encompasses revocable *and* irrevocable transfers; but that in Sec. 2036(b) the same word is limited to irrevocable transfers. (A. 18, 22.) This is in direct conflict with the decisions of the Second and Third Circuits and the Tax Court as to what the word "transfer" means in Sec. 2036(b).

The Court below admitted that:

> "The question before us is one that is not new or novel, but it is one on which there is a split of authority between courts of equal persuasiveness," (A. 16),

citing *Estate of Robert J. Cuddihy*, 32 TC 1171 (1959); *Estate of Ellis Branson Ridgway*, 33 TC 1000 (1960), *aff'd* 291 F.2d 257 (3 Cir., 1961); *Estate of Ellie G. Canfield*, 34 TC 978 (1960), *aff'd* 306 F.2d 1 (2 Cir., 1962); and *Estate of Newcomb Carlton*, 34 TC 988 (1960), *rev'd* on other grounds, 298 F.2d 415 (2 Cir., 1962), as deci-

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* Sec. 811(c) (1) (B), IRC 1939, corresponds to Sec. 2036(a) and the limitation provision applicable to Sec. 811(c) (1) (B) corresponds to Sec. 2036(b), IRC 1954. (A. 7, fn. 6, 16.)

sions conflicting with *Smith* and its own decision herein.* (A. 16.)

In *Ridgway's Estate*, (CA Third, 1961), 291 F.2d 257, 259, 261, 7 AFTR 2d 1837, 1838, *aff'g* 33 TC 1000 (1960), the decedent created a trust in 1930. The income was payable to his wife for life, after her death to himself for life, and after the death of the survivor to their two sons for life, with remainder over. Decedent reserved the power to change the terms of distribution of the income or the principal, except in favor of himself or his estate, which power he relinquished in 1944.

The Tax Court held that the transfer took place when the trust was created in 1930—not when the power was relinquished in 1944; and that the transfer came under the limitation provision applicable to Sec. 811(c)(1)(B), IRC 1939, as a transfer made prior to March 4, 1931. (A. 10.)

The Court of Appeals for the Third Circuit affirmed, holding:

> "The appeal comes down to this. Is a 'transfer' which is otherwise taxable under the general provisions of subparagraph (B) relieved of taxation under the exception,** provided only that it occurred prior to March 4, 1931? The answer must be yes, unless we give a different meaning to the word 'transfer' when used in the exception than we do to that same word when used in the general provisions of the subparagraph.
>
> "Where a word or phrase is used in different parts of the same statute, it will be presumed to have the same meaning throughout. Atlantic Cleaners & Dyers, Inc. v. U. S., 286 U.S. 427 (1932); Schooler v. U. S.,

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* Other Tax Court decisions conflicting with *Smith* and the decision of the Court below are *Battle*, PH TC Memo 1961-143 and *Brenner*, PH TC Memo 1966-39.

** The limitation provision is sometimes referred to by the courts as the "exception" or the "exemption" provision.

231 F.2d 560 (CA Eighth, 1956). The need for uniformity becomes more imperative where the same word or term is used in different statutory sections that are similar in purpose and context. In re Associated Gas and Electric Co., 11 F. Supp. 359 (N. D. N. Y., 1935), or where, as here, a word is used more than once in the same section. * * * See U. S. v. Olympic Radio and Television, Inc., 349 U. S. 232 (47 AFTR 662) (1955)." (291 F.2d at 259.)

"* * * At the risk of repetition, we say that the Commissioner's contention cannot be sustained, because of the fact that the exception provision expressly refers to transfers within the ambit of the general provision of subparagraph (B), which admittedly encompasses revocable transfers, and thus the word 'transfer' in the exception provision cannot possibly be limited to irrevocable ones. Neither the statute nor its legislative history support the Commissioner." (291 F.2d at 259.)

In *Canfield's Estate*, (CA Second, 1962), 306 F.2d 1, 3, 6, 10 AFTR 2d 6170, 6172, 6175, *aff'd* 34 TC 978 (1960), decedent created a trust in 1919 to which he transferred the legal title of certain securities, reserved the income for life, and also a testamentary power of appointment over the corpus which he relinquished in 1942.

The question was whether the transfer was made in 1919, when the property was transferred to the trust, so as to bring the transfer under Sec. 2036(b), or when decedent relinquished the power in 1942, so as to bring the transfer within Sec. 2036(a), IRC 1954.

The Court of Appeals for the Second Circuit held:

"The Tax Court followed its prior decisions on this issue and held 'the transfer to which the exemption provision refers is the transfer of legal title to the trust upon the creation of the trust. * * *' We affirm." (306 F.2d at 3.)

* * * *

> "Petitioner's (Commissioner's) contentions, moreover, are not supported by the statutory language. Presumptively, we should think, 'transfer' must be read to mean the transfer of legal title to a trust without regard to the reservation of certain powers over the corpus. It was so interpreted prior to the Joint Resolution of 1931, and we believe it must be presumed, in the absence of any language in that enactment to the contrary, that meaning was retained." (306 F.2d at 6.)

II

The Court Below Violated the Rule Of Statutory Interpretation Laid Down By This Court In Resorting To Legislative History When the Language Is Clear And Unambiguous.

The word "transfer" is used in Sec. 2036(a) and in Sec. 2036(b) without qualification, restriction or limitation. It is clear and unambiguous, so the presumption is that it is used in its normal sense and that it has the same meaning in both places. The Court below admitted this to be the customary rule:

> "Normally, only one meaning of a word is used in one section of a statute and, certainly, artful draftsmanship and proper judicial construction should seek to avoid a contrary conclusion. In the technical area of tax law there is a need for clarity of meaning so that a taxpayer, in conducting and planning his actions, may rely upon the words of a statute as written, or as construed in analogous contexts." (A. 17.)

Despite this admission, the Court below resorted to legislative history in deciding that the word "transfer" has two different meanings in Sec. 2036—that it means both revocable and irrevocable transfers in subsection (a), but that it means only irrevocable transfers in subsection (b). This is in conflict with the decisions of this Court applicable to the interpretation of statutory language, which is clear and unambiguous.

In *Ex Parte Collett*, 337 U.S. 55, 61, 93 L. Ed. 1207, 1211 (1949), this Court speaking through Chief Justice Vinson stated the rule:

> "*Third.* Petitioner's chief argument proceeds not from one side or the other of the literal boundaries of Sec. 1404(a), but from its legislative history. The short answer is that there is no need to refer to legislative history, where the statutory language is clear. * * * This canon of construction has received consistent adherence in our decisions." (337 U.S. at 61.)

In *McKesson & Robbins*, 351 U.S. 305, 311, 312, 315, 100 L. Ed. 1209, 1215, 1217, this Court speaking through Chief Justice Warren said:

> "We are to take the words of these statutes in their 'normal and customary meaning.' (351 U.S. at 311, 312.) * * * The Court below did not rely on the legislative history, finding it to be 'unedifying and unilluminating.' We agree with this appraisal, but are not troubled by it since the language of the provision in question is unambiguous." (351 U.S. at 315.)

In *Comm.* v. *Ridgway, supra*, the Court of Appeals for the Third Circuit in interpreting the word "transfer" in Sec. 2036(b) said:

> "We should not resort to legislative history, where, as here, the language of the statute is so clear as to require no construction. Helvering v. City Bank Farmers Trust Co., 296 U.S. 85, 89, 16 AFTR 984, (1935); Wilbur v. United States ex rel. Vindicator Consolidated Gold Mining Co., 284 U.S. 231, 237 (1931); U. S. v. Missouri Pacific R. R., 278 U.S. 269, 278 (1929). Unlike other extrinsic aids to statutory construction, legislative history is to be used to solve and not create ambiguity. U. S. v. Shreveport Grain & Elevator Co., 287 U.S. 77, 83 (1932). Nonetheless, we have examined the legislative history of Sec. 7 of the Technical Changes Act of 1949, to-

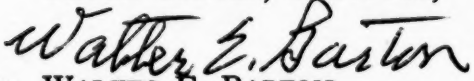
gether with the several decisions that led to its enactment, and are convinced they fully support our conclusion." (291 F.2d at 260.)

PRAYER

For the foregoing reasons, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the U. S. Court of Appeals for the Fourth Circuit, commanding that Court to certify and to send to this Court for its review and determination, a complete transcript of the record and all proceedings in the case on its Docket No. 12,081, entitled Comm. v. Estate of Eleanor Buchanan Talbott, Deceased, Bryan Carver, Executor.

Respectfully submitted,

ELEANOR BUCHANAN TALBOTT, DEC.,
BRYAN CARVER, EXECUTOR,



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APPENDIX

TAX COURT OPINION

[Caption omitted]

(Decided June 14, 1967)

DAWSON, *Judge:* Respondent determined a deficiency in estate tax against the Estate of Eleanor Buchanan Talbott in the amount of $67,217.77.[1]

Some adjustments made in the notice of deficiency have not been contested by petitioner. Additional deductions claimed for administrative expenses will be resolved in the Rule 50 computation. This leaves only one issue for our decision: Did the decedent make transfers to a trust prior to March 4, 1931, within the meaning of section 2036(b), Internal Revenue Code of 1954,[2] so as to exclude the value of the properties from her gross estate?

The facts have been fully stipulated by the parties and are hereby found accordingly.

Eleanor Buchanan Talbott (hereinafter called decedent) died on December 30, 1962, while a resident of Hot Springs, Virginia. Bryan Carver (hereinafter called petitioner), a resident of Hot Springs, Virginia, at the time this petition was filed, is the duly appointed executor of her estate. The Federal estate tax return for the decedent's estate was filed with the district director of internal revenue at Richmond, Virginia.

On July 5, 1923, the decedent created a trust, relevant portions of which are set forth below:

> THIS INDENTURE, made the 5th day of July, 1923, by and between ELEANOR B. TALBOTT, residing at

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[1] In arriving at this net deficiency in his notice of deficiency, the respondent took cognizance of the estate's right to a credit for State death taxes, if paid, in the amount of $4,524.20.

[2] All references herein are to the Internal Revenue Code of 1954 unless otherwise indicated.

Baltimore, Maryland, party of the first part, and EQUITABLE TRUST COMPANY OF NEW YORK, a corporation duly organized and existing under the banking laws of the State of New York, having its principal office for the transaction of business at No. 37 Wall Street, Borough of Manhattan, City of New York, party of the second part, herein called the "Trustee."

WHEREAS, the party of the first part desires to create a trust for certain purposes and to have the party of the second part become trustee thereof; and

WHEREAS, the party of the second part is authorized under the laws of the State of New York to act as such trustee and is willing to accept the said trust,

NOW, THEREFORE, THIS INDENTURE WITNESSETH, that, in consideration of the premises, the mutual covenants herein contained and other goods and valuable consideration, and of the sum of One Dollar ($1) to her in hand paid by the party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the acceptance by the Equitable Trust Company of New York of the trusts hereinafter declared, the party of the first part has granted, conveyed, assigned, set over and delivered, and by these presents does grant, convey, assign, set over and deliver unto the party of the second part and its successors, all of the right, title and interest of the party of the first part in and to the securities and other properties and rights with the appurtenances thereto, set forth in the Schedule annexed, which is hereby made a part of this instrument, and which securities, properties and rights, together with any addition thereto, are herein collectively called the "Trust Fund."

TO HAVE AND TO HOLD all and singular the above granted and described securities, properties and rights, and any additions thereto, unto the said party of the second part and its successors, IN TRUST NEVERTHELESS, during the lives of the party hereto of the first part, and WILLIAM M. TALBOTT of Baltimore,

Maryland, persons now in being, for and upon the following uses and purposes and subject to the terms, conditions, powers and agreements hereinafter set forth.

FIRST: To conserve and diligently protect the Trust fund, and to receive, hold, manage, sell, invest and reinvest the same and every part thereof, in its sole discretion, subject to the conditions and limitations herein contained, and to collect, recover and receive the rents, issues, interest and income thereof, and of all proceeds and any reinvestments of the same and of any part thereof, including any interest and income already accrued, hereinafter called the "Income," and after deducting its commissions as hereinafter provided and the proper and necessary expenses in connection with the administration of the trust, to pay the said income in monthly instalments of equal amount, or as nearly equal as possible, unto William M. Talbott and the party hereto of the first part, for and during the term of their joint lives, and upon and after the death of either said William M. Talbott or the party hereto of the first part, then unto the survivor for and during the term of his or her natural life, or until terminated as hereinafter set forth.

SECOND: Upon the death of the said William M. Talbott and the party hereto of the first part, if this trust has not sooner been terminated as hereinafter provided, to pay, convey, assign, set over and deliver this trust fund, together with any accumulated and any unpaid income thereon, unto ALLEN T. TALBOTT and CHARLES FOSTER TALBOTT, both of Baltimore, Maryland, brothers-in-law of the party hereto of the first part, and MRS. HATTIE A. BURNS, of Junction City, Kansas, and MRS. MINNIE J. KARIGAN of San Francisco, California, or the survivors of them, in equal shares, and to the issue of any of the above named who shall have died leaving issue living at the death of the survivor of William M. Talbott and the party of the first part, such issue of any of the four above mentioned persons who shall have so predeceased the survivor of said William M. Talbott and

the party hereto of the first part dividing equally among them the share their parent would have taken if living.

* * * *

TENTH: Notwithstanding anything to the contrary herein contained, this agreement or the terms thereof may, from time to time, during the continuance of the trust hereby created, by instrument of the party hereto of the first part and said William M. Talbott, or by the survivor of them, together with Charles F. Talbott, in writing, executed and acknowledged in the manner required for a deed of real property so as to enable it to be recorded in the State of New York and delivered to the Trustee, modify or alter in any manner, or revoke in whole or in part, this indenture and the trusts then existing, and the estates and interests in property hereby created, and in case of such revocation said instrument shall direct the disposition to be made of the trust fund or of the portion hereof affected by such revocation, and the Trustee shall make, execute and deliver such instruments, and make such conveyances and transfer of property as may be necessary or proper in order to carry the same into effect.

A list of the securities transferred to the trust by decedent was attached to the trust agreement. Decedent transferred other securities to the trust corpus in November 1929. Subsequently, on October 3, 1932, and again on April 10, 1933, the decedent and William M. Talbott exercised their power under paragraph 10 of the trust indenture and partially revoked the trust through the withdrawal of specified securities.

William M. Talbott was the husband of the decedent. He died on November 15, 1935. Charles F. Talbott, who is also mentioned in the trust indenture, died on March 6, 1937.

On June 9, 1943, the decedent signed an instrument directing the trustee on how to apportion the funds received from the distribution of specified bonds between the trust income and principal.

In 1964, the successor trustee of the above trust made an application to the Supreme Court of the State of New York, County of New York, for instructions, judicial settlement of its final account of proceedings, and for construction of the trust indenture. In its Final Order, Index No. 1360/1964, the court ordered "that Eleanor B. Talbott had no authority to revoke the trust to the extent contained in the instrument executed by her on June 9, 1943; * * *"

The trust was still in existence at the time of Eleanor B. Talbott's death.

The petitioner contends that decedent's transfer of securities to the trust occurred prior to March 4, 1931, thus falling within the provisions of section 2036(b). Petitioner also contends that the trust indenture created two consecutive joint powers to modify, alter, or revoke the trust in whole or in part;[3] that the decedent never had a unilateral power to modify, alter, or revoke the trust; and that any power to modify, alter, or revoke the trust terminated upon the death of Charles F. Talbott in 1937.

Respondent maintains that William M. Talbott, the decedent's husband, was not an adverse party with regard to the power to modify, alter, or revoke the trust remainder. Therefore, he argues that the decedent retained, until her husband's death in 1935, the unilateral right to revest the trust remainder in herself and that she did not, as

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[3] The parties agree that the tenth paragraph of the trust indenture must be interpreted to mean that the decedent and William M. Talbott had the power to modify, alter, or revoke the trust during their joint lives and that on the death of either, the survivor had this power in conjunction with Charles Talbott. Moreover, the trust indenture was given this interpretation when partial revocations were made in the trust in 1932 and 1933. While we might be inclined to interpret the trust provisions to mean that the decedent and William M. Talbott during their joint lives could act only in conjunction with Charles Talbott, we feel constrained to accept the interpretation agreed upon by the parties to this action and relied upon by the parties to the trust indenture.

a result, effectuate a completed transfer of the trust property until that time. Thus, he takes the position that the decedent's transfer did not fall within the exception contained in section 2036(b) and the property must be included in her gross estate under the provisions of section 2036(a).

The decedent created the trust in 1923. The trust indenture provided for income to her and her husband during their joint lives, then to the survivor of them for his or her life, with the remainder to four specified persons, including Charles F. Talbott, or their issue. Decedent and her husband had the power to modify, alter, or revoke the trust during their joint lives, such power then passing to the survivor of them and Charles F. Talbott during their joint lives. On March 4, 1931, both decedent and her husband were alive and they had the power to modify, alter, or revoke the trust as of that date.

Petitioner argues that the decedent could revoke the trust only through a joint action with the appropriate party; respondent argues that she only needed that party's consent. Under either theory, however, the trust was revocable on March 4, 1931, since on that date the decedent could revoke it in conjunction with her husband and he, having only a life estate, did not have an adverse interest in the remainder. See *Estate of Abraham Koshland*, 11 T.C. 904 (1948), affd. 177 F.2d 851 (C.A. 9, 1949).

The parties agree that the trust property is includable in decedent's gross estate under section 2036(a)[4] if the

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[4] SEC. 2036. TRANSFERS WITH RETAINED LIFE ESTATE.

(a) General Rule.—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—

exception provided in section 2036(b)[5] does not apply. Hence, the pivotal question is whether a "transfer" within the meaning of section 2036(b) occurred on July 5, 1923, and in November 1929, the dates on which the title to the securities passed to the trust, or on the date subsequent to March 4, 1931, when the trust became irrevocable.

Respondent relies on *Smith* v. *United States* 139 F.Supp. 305 (Ct. Cls. 1956), and *Studebaker* v. *United States*, 211 F.Supp. 263 (N.D. Ind. 1962), for the proposition that the date of transfer within the meaning of section 811(c)(1)(B)[6] is the date the trust becomes irrevocable. However, this Court, in four recent cases, has expressed its disagreement with the Court of Claims' interpretation of section 2036(b) and its predecessors. See *Estate of Robert J. Cuddihy*, 32 T.C. 1171 (1959); *Estate of Ellis Branson Ridgway*, 33 T.C. 1000 (1960), affd. 291 F.2d 257 (C.A. 3, 1961); *Estate of Ellie G. Canfield*, 34 T.C. 978 (1960), affd. 306 F.2d 1 (C.A. 2, 1962); and *Estate of Newcomb Carlton*, 34 T.C. 988 (1960), reversed on other grounds, 298 F.2d 415 (C.A. 2, 1962). Upon careful examination of the legislative and judicial history[7] of section 811(c)(1)(B) [now section 2036(b)], this Court has consistently

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[4] [Continued]

(1) the possession or enjoyment of, or the right to the income from, the property, or

(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

[5] SEC. 2036(b) Limitation on Application of General Rule.—This section shall not apply to a transfer made before March 4, 1931; nor to a transfer made after March 3, 1931, and before June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516).

[6] This section in the 1939 Code is the identical predecessor of section 2036(b).

[7] See the discussion contained in *Estate of Robert J. Cuddihy, supra* at pp. 1173-76, and *Estate of Ellie G. Canfield*, 34 T.C. at p. 986.

held that the "transfer" to which section 2036(b) refers is the date of transfer of legal title to the trustee upon the creation of a trust, and not the date on which the trust becomes irrevocable. Using this criterion, we find that the decedent transferred her property to the trust by November 1929, the last date on which she gave securities to the trust. The fact that she retained powers to revoke the trust, so that the trust was revocable as of March 4, 1931, is an irrelevant factor in applying the rule adopted by this Court.

This is the first case to come before us in which the grantor had the right as of March 4, 1931, to revoke the trust without the consent or joint authority of persons having an adverse interest in the trust remainder. At first blush this would seem to be the critical factor since in the *Cuddihy*, *Ridgway*, *Canfield*, and *Carlton* decisions we distinguish the *Smith* case on the ground that, unlike the trust in the *Smith* case which was revocable until 1933, the trusts in the four Tax Court cases were all irrevocable as of March 4, 1931. However, after distinguishing the *Smith* case, we further stated in *Cuddihy*, *supra* at pp. 1175-1176:

> The respondent's reliance upon the legislative history of section 811(c)(1) is not persuasive because the wording of the statute, which speaks simply of "a transfer made before March 4, 1931," is plain and unambiguous. *Crooks* v. *Harrelson*, 282 U.S. 55; *Alexander C. Yarnall*, 9 T.C. 616, affd. 170 F.2d 272. Taken in its normal sense, the application of the statutory phrase in question to a transfer in trust appears to refer to the time of the transfer of title to the trustee, rather than to some subsequent time when a retained right or power is released. The exemption section neither mentions nor implies the nonexistence of a right to terminate as requisite to an exempt transfer, and we see no reason to read into it an exception not stated or implied.

We are supported in our view of the meaning to be placed on the words "a transfer made before March 4, 1931," by the fact that it is consistent with the statutory usage of the word "transfer" in section 811. Section 811(d), for example, imposes an estate tax on a "transfer" that is revocable by the decedent. Section 811(c)(1)(B) taxes a "transfer" under which the decedent has retained possession, enjoyment, or the right to income from the transferred property. Section 811(c)(1)(C) taxes a "transfer" intended to take effect in possession or enjoyment at or after his death. It is, therefore, apparent that the word "transfer," as used in section 811, does not necessarily refer to an absolute or completed transfer of the entire beneficial interest in the conveyed property. Identical words used in different parts of the same statute must be construed to mean the same thing unless a contrary meaning is clearly shown. *United States* v. *Olympic Radio & Television*, 349 U.S. 232; *Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84.

For the foregoing reasons, we are of the opinion that the transfer to which the last sentence of section 811(c) refers is the transfer of legal title to a trustee upon the creation of a trust prior to March 4, 1931. A transfer in trust under which a settlor retains a right to join in a termination solely in favor of his children clearly falls within the terms of the exemption. We accordingly hold that the transaction here involved, which occurred on May 20, 1926, is excluded from the operation of section 811(c)(1)(B).

The *Cuddihy* decision was followed in the *Ridgway*, *Canfield*, and *Carlton* cases which reiterated this position. Thus the basic rationale of this Court is that the statutory provision does not refer to an absolute or completed transfer of the entire beneficial interest in the conveyed property.

In the *Ridgway* case, the Court of Appeals for the Third Circuit avoided a direct conflict with the Court of Claims by distinguishing *Smith*, although it stated that the dis-

senting opinion of Judge Laramore expressed the better view. In *Canfield*, the Court of Appeals for the Second Circuit also distinguished both *Smith* and *Studebaker* to the extent that the language of those opinions was contrary to its own. However, it specifically refrained from expressing an opinion with respect to a situation involving a trust *revocable* by the settlor acting alone or in conjunction with a nonadverse party.

It is clear that the rule in this Court is that the date of "transfer" within the intendment of section 2036(b) is the date the title passes to the trustee. Despite respondent's nonacquiescence in our prior decisions, his adherence to Rev. Rul. 277, 1953-2 C.B. 265, and his persistence in litigation, we are not disposed to chart a new course now. We decline to include the additional requirement that the "transfer" must be irrevocable at the time title passed to the trustee. See *Estate of Ellie G. Canfield, supra* at p. 986; *Estate of Ellis Branson Ridgway, supra* at p. 1003; *Estate of Robert J. Cuddihy, supra* at p. 1175-76; and the dissenting opinion in *Smith* v. *United States, supra* at p. 313. This interpretation of the statute compels the conclusion that all pre-March 4, 1931 "transfers" fall within the exception contained in section 2036(b) regardless of any power to revoke which the grantor may have retained. Consequently, we hold that when the decedent transferred title to her securities to the trustee in July 1923 and November 1929, she made a transfer prior to March 4, 1931, which comes within the exception provided by section 2036(b). Hence, section 2036(a) does not apply to include the value of the trust property in the decedent's estate for estate tax purposes.

Decision will be entered under Rule 50.

U. S. COURT OF APPEALS OPINION

[Caption omitted]

(Decided September 20, 1968)

Before BOREMAN, WINTER and CRAVEN, Circuit Judges:

WINTER, *Circuit Judge:* The Tax Court held that the res of an inter vivos trust, created in 1923, was not includable in the surviving settlor's gross estate for purposes of the federal estate tax.[1] It did so on the theory that the transfer of the corpus was complete prior to March 4, 1931, notwithstanding the Commissioner's contention that a power to amend or to revoke the trust possessed by the settlor and her husband, an allegedly nonadverse party, continued at least until 1935, so that the complete and irrevocable transfer of the corpus did not occur before March 4, 1931, thus rendering inoperative § 2036(b) of the Internal Revenue Code of 1954, as amended. 26 U.S.C.A. § 2036(b) (1967 Ed.).[2] We reverse.

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[1] *Estate of Eleanor Buchanan Talbott*, 48 T.C. 271 (1967).

[2] The full text of § 2036, which provides which trusts having reserved life interests are subject to the estate tax and which are not, follows:

"§ 2036. Transfers with retained life estate

(a) General rule.—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—

(1) the possession or enjoyment of, or the right to the income from, the property, or

(2) the right, either alone or in conjunction with any person,

Eleanor Buchanan Talbott ("decedent") was a resident of Hot Springs, Virginia, at the time of her death on December 30, 1962. Bryan Carver ("taxpayer"), a resident of Hot Springs, Virginia, is the duly appointed executor of her estate.

On July 5, 1923, the decedent executed a trust under the terms of which the net income was payable to the decedent and her husband during their joint lives, and upon the death of either to the survivor for life. Paragraph SECOND of the trust agreement, provided that after the death of both the decedent and her husband, the corpus of the estate was to be paid over to four named beneficiaries or their survivors. Paragraph TENTH provided that the decedent could, during her husband's life and with his consent, modify, alter, or revoke the trust in whole or in part. It further provided that the surviving life income beneficiary could do so with the consent of Charles F. Talbott, one of the remaindermen. Transfers of securities were made to the trust corpus in 1923 and in 1929. On October 3, 1932, and on April 10, 1933, the decedent with the consent of her husband revoked the trust in part. The consent of Charles F. Talbott to these partial revocations was neither sought nor obtained.

The decedent's husband died on November 15, 1935. Charles F. Talbott died on March 6, 1937.

In 1943, the decedent executed an instrument directing the manner in which the trustee was to appropriate funds

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to designate the persons who shall possess or enjoy the property or the income therefrom.

(b) Limitations on application of general rule.—This section shall not apply to a transfer made before March 4, 1931; nor to a transfer made after March 3, 1931, and before June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516)."

We need not concern ourselves with the possibility of a transfer made after March 3, 1931, and before June 7, 1932, in this case. There was in fact none.

received from the distribution of specified bonds, as between the trust income and principal. In 1964, the supreme Court of the State of New York entered a final accounting order which provided, *inter alia*, that the decedent had no authority to revoke the trust to the extent contained in the instrument executed in 1943.

The trust was still in existence at the date of the decedent's death.

As appears from the text quoted in the margin, § 2036 (a) of the Internal Revenue Code of 1954 requires the inclusion of the corpus of a trust created by the decedent in her gross estate for federal estate tax purposes if she retained a life estate. Section 2036(b) excepts from that provision a "transfer" made before March 4, 1931. In the case at bar, the trust instrument was executed in 1923 and conveyances to the res made in 1923 and 1929, all before the crucial date. But the decedent reserved the right to amend or revoke the trust in whole or in part with the consent of her husband during their joint lives and thereafter, if she survived her husband, with the consent of one of the remaindermen. Her husband died in 1935 and the remainderman whose consent to amendment or revocation was thereafter requisite died in 1937. What we must decide is when the "transfer" of the corpus occurred, and specifically whether it occurred prior to March 4, 1931. Our decision proceeds from our determination that decedent's husband did not have a substantial adverse interest to her during his lifetime and that § 2036(b) applies only to irrevocable trusts.

-I-

Although the Tax Court deemed immaterial the question of whether the trust was revocable, it did find that the decedent's husband did not have a substantial adverse interest and that the trust, therefore, was revocable on March 4, 1931. With this conclusion we agree. A life interest in income has been held to be not such a substan-

tial interest as substantially adversely affected decedent's control over the remainder. *Abraham Koshland*, 11 T.C. 904 (1948), *aff'd.*, 177 F.2d 851 (9 Cir. 1949). Where, as in the instant case, decedent retained the power to alter, as well as to revoke, the trust, the same rule applies, because alteration is but partial revocation—a species of, although usually something less than, complete revocation.

Nor was decedent's husband's interest rendered substantially adverse because, in the event of revocation, he was required to join in, or to consent to, the disposition of the res or the portion thereof affected by partial revocation. We recognize that decedent's husband could exercise the requirement of his joinder or consent in such a way as to direct a portion of the res to himself or his nominees and thus prevent decedent from exercising full dominion over the res.[3] But, absent a showing that it would be reasonable to believe that this authority was, or would have been, used in this manner—and on this record there is none, it does not constitute a substantial adverse interest. Too easily could decedent and her husband, had they determined to revoke the trust entirely, and to return the res to decedent's unfettered legal dominion and control, have employed a straw man as the initial transfee, to render the "adverseness" of decedent's husband's interest more illusory than real.

To show that there was a substantial adverse interest and, hence, to establish that the trust was irrevocable, taxpayer argues that, properly construed, Paragraph TENTH of the trust indenture required Charles F. Talbott to consent to, or to join in, the revocation, modification or alteration of the trust in whole or in part even during the life-

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[3] We note that there is authority that husband and wife cannot have a substantial adverse interest against each other. *Altmaier* v. *Commissioner*, 116 F.2d 162 (6 Cir. 1940), *cert. den.*, 312 U.S. 706 (1941). *Contra: Commissioner* v. *Betts*, 123 F.2d 534 (7 Cir. 1941). We deem it unnecessary to place our decision on this ground.

time of both life tenants.[4] This argument was not advanced in the Tax Court; indeed, there it was assumed that during the joint lives of the life tenants, the joinder or consent of Charles F. Talbott was unnecessary. The short answer to the contention is whatever ambiguity may have existed about the correct meaning of Paragraph TENTH the actions of the parties spoke louder and more clearly than their words. On two occasions during the joint lives of decedent and her husband there were partial revocations of the trust; on neither was the joinder or consent of Charles F. Talbott sought or obtained. After the fact, we will not permit the taxpayer to urge a contrary interpretation. The actions of the parties most directly concerned have cured any latent ambiguity in the trust instrument.

- II -

Having concluded that decedent's husband did not have a substantial adverse interest, and that Charles F. Talbott was not invested with any voice in the revocation, amendment or modification of the trust during the joint lives of the life tenants, we turn to the question of whether § 2036(b) was intended to exclude revocable, as well as irrevocable, trusts established before March 4, 1931, from

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[4] The pertinent portion of the indenture follows:

"TENTH: Notwithstanding anything to the contrary herein contained, this agreement or the terms thereof may, from time to time, during the continuance of the trust hereby created, by instrument of the party hereto of the first part and said William M. Talbott, or by the survivor of them, together with Charles F. Talbott, in writing, executed and acknowledged in the manner required for a deed of real property so as to enable it to be recorded in the State of New York and delivered to the Trustee, modify or alter in any manner, or revoke in whole or in part, this indenture and the trusts then existing, and the estates and interests in property hereby created, and in case of such revocation said instrument shall direct the disposition to be made of the trust fund or of the portion hereof affected by such revocation, and the Trustee shall make, execute and deliver such instruments, and make such conveyances and transfer of property as may be necessary or proper in order to carry the same into effect."

the settlor's gross estate. The question arises because decedent's husband lived until 1935, so that, for tax purposes, the trust did not become irrevocable until that date.

The question before us is one that is not new or novel, but it is one on which there is a split of authority between courts of equal persuasiveness. *Smith* v. *United States*, 139 F. S. 305 (Ct. Claims 1956), in a full and exhaustive opinion, held flatly that § 811(c)(1)(B) of the Internal Revenue Code of 1939 (the predecessor of present § 2036 (b) of the Internal Revenue Code of 1954, as amended) had no application to transfers in trust which were not complete and irrevocable prior to March 4, 1931. There was a vigorous dissent by Judge Laramore in which one other judge concurred, but the majority view in the *Smith* case has been followed in *Studebaker* v. *United States*, 195 F. S. 841 (N.D. Ind. 1961), modified, 211 F. S. 263 (1962).

On the other hand, the Tax Court in *Estate of Robert J. Cuddihy*, 32 T.C. 1171 (1959); *Estate of Ellis Branson Ridgway*, 33 T.C. 1000 (1960), *aff'd.*, 291 F.2d 257 (3 Cir. 1961); *Estate of Ellie G. Canfield*, 34 T.C. 978 (1960), *aff'd.*, 306 F.2d 1 (2 Cir. 1962); and *Estate of Newcomb Carlton*, 34 T.C. 988 (1960), *rev'd. on other grounds*, 298 F.2d 415 (2 Cir. 1962), has consistently expressed disagreement with the holding in *Smith*, although in each case, prior to the instant one, the Tax Court distinguished *Smith* on the ground that *Smith*, like the case at bar, concerned a trust revocable in favor of the settlor until after March 4, 1931, while the cases before the Tax Court concerned cases in which the transfer in trust was irrevocable prior to March 4, 1931, in the sense that the settlor could revoke the trust only for the benefit of others but not for himself.[5]

At the appellate level, in *Commissioner* v. *Estate of Ridgway*, 291 F.2d 257 (3 Cir. 1961), the Third Circuit

[5] We express no view as to whether the distinction is valid.

Court of Appeals distinguished *Smith*, but added "in any event, we think that Judge Laramore's dissenting opinion expresses the better view." 291 F.2d, at 258. The Second Circuit in *Commissioner* v. *Estate of Canfield*, 306 F.2d 1 (2 Cir. 1962), also distinguished *Smith*, but stated that if not distinguishable, it would not be followed. However, the Second Circuit further stated that it left open the question of what result would be reached "in a case involving a trust revocable by the settler acting * * * in conjunction with a nonadverse party"—the precise question before us in the present case. 306 F.2d, at 8.

We are persuaded by *Smith* and *Studebaker* and conclude to follow them. We refer to them for a fuller discussion of the reasons for their result, but we also summarize the reasons which lead us to agree.

The primary difficulty that other courts have had with the Comissioner's contention that § 2036(b) is inapplicable to revocable trusts is that its acceptance introduces lack of uniformity to be afforded the meaning of the word "transfer" as used generally in the tax laws, and particularly in subsections (a) and (b) of § 2036. See, e.g., *Smith* v. *United States*, 139 F. S. 310-311 (dissenting opinion). Normally, only one meaning of a word is used in one section of a statute and, certainly, artful draftsmanship and proper judicial construction should seek to avoid a contrary conclusion. In the technical area of tax law there is a need for clarity of meaning so that a taxpayer, in conducting and planning his actions, may rely upon the words of a statute as written, or as construed in analogous contexts. However, these considerations are not of paramount importance, nor do they present insurmountable hurdles, if there is a clear indication that the intention of Congress requires a different result. Indeed, the factor of reliance is entitled to little weight in this case. No longer may a pre-March 4, 1931, trust be established so that only on the very limited question of whether a retained life estate should be released to reduce estate taxes could § 2036(b) be relevant to tax planning.

Our examination of the background, context and expressed legislative intent in regard to the enactment of § 2306(b) lead us to conclude that it is applicable only to trusts having reserved life estates but irrevocable on March 4, 1931, and that we should give it that effect. We state these factors:

Under pre-1931 law the corpus of a revocable trust under which a life interest in the income was retained was includable in the settlor's gross estate. See, e.g., *Reinecke* v. *Northern Trust Co.*, 278 U.S. 339 (1929). But, in *May* v. *Heiner*, 281 U.S. 238 (1930), the Supreme Court held that the mere retention of a life interest in an irrevocable trust was not sufficient to bring the corpus of the trust into the settlor's gross estate. On March 3, 1931, the day after three *per curiam* decisions of the Supreme Court [6] had made the implications of the *May* case apparent, Congress passed a Joint Resolution which altered the statutory scheme to bring the corpus of an irrevocable trust with a reserved life interest into the settlor's gross estate.[7] However, this Joint Resolution did not make totally unimportant the distinction which had theretofore been made between revocable and irrevocable trusts, because it was construed only to apply to trusts created after the date of its enactment. *Hassett* v. *Welch*, 303 U.S. 303 (1938).

The Supreme Court wrought a total change in these circumstances in January, 1949, when, in *Commissioner* v.

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[6] *Burnet* v. *Northern Trust Co.*, 283 U.S. 782 (1931); *McCormick* v. *Burnet*, 283 U.S. 784 (1931); *Morsman* v. *Burnet*, 283 U.S. 783 (1931).

[7] At this time Congress recognized that the prior court decisions had made a distinction between revocable and irrevocable trusts, and that the Joint Resolution was directed only at the latter. In the House Report accompanying proposed 1932 amendments to the Joint Resolution of March 3, 1931, it was stated that the "Joint Resolution was designed to avoid the effect of the decisions of the Supreme Court holding such a transfer [a transfer under which the decedent has reserved an interest in the income for life] not taxable if *irrevocable* and not made in contemplation of death." (emphasis added.) H.Rep. No. 708, 72nd. Cong., 1st Sess., p. 46.

Estate of Church, 335 U.S. 632 (1949), it overruled *May* v. *Heiner*, *supra*, and held that even without the Joint Resolution of March 3, 1931, the corpus of a pre-March 4, 1931, irrevocable trust with a reserved life estate was includable in the settlor's gross estate. In October, 1949, Congress, in response to the *Church* decision, passed the Technical Changes Act of 1949, c. 720, 63 Stat. 891, which included the exception, now embodied in § 2036(b), of pre-March 4, 1931, transfers from the retention-of-income provision of the estate tax law. The clear intent of Congress in engrafting this exception upon the law was to correct the manifest unfairness worked by the *Church* decision upon those who had relied upon the pre-1931 law in setting up irrevocable trusts with a retained life estate. This intent is made plain in the explanatory report of the Senate Finance Committee, set forth in the margin.[8]

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[8] "Section 7, which your committee had added to the House bill, amends section 811(c) of the Internal Revenue Code (relating to the estate tax treatment of transfers in contemplation of, or intended to take effect in possession or enjoyment at or after, the decedent's death) to provide that property transferred before March 4, 1931, shall not be included in the transferor's gross estate by reason of the fact that he retained an estate for his life in the transferred property.

* * * *

In the joint resolution of March 3, 1931, Congress created a new estate tax rule with respect to transfers after March 3. It left unchanged the rule in effect for transfers before that date. It is the opinion of your committee that the old rule should have been continued in effect with respect to such transfers until changed by legislation. Since the rule has been changed by the Supreme Court in the Church opinion, *your committee believes that the Congress should act to restore the estate tax law to what it was prior to the Church opinion.*

Some persons might have surrendered their life estates after 1931 had they not relied on the interpretation of the estate tax law which has now been overruled and in some cases considerable hardship may result from application of the new interpretation presented in the Church case. It is the opinion of your committee that after all of these years these persons are entitled to rely upon the long standing interpretation in *May* v. *Heiner*, and the proposed amendment is accordingly intended to assure that result. While the Treasury has proposed regulations which would relieve, in some cases, the hardship arising from application of the Church

Particularly significant is the statement that "your committee believes that the Congress should act to restore the estate tax law to what it was prior to the Church opinion." We think that Congress understood the law to be as it has been outlined above, having expressly recognized that the 1931 Joint Resolution was concerned only with irrevocable trusts,[9] and, therefore, in the eyes of Congress, the restoration of the law as it existed before *Church* involved only providing for the operation of the retention-of-income provision of the estate tax law.

That this was the Congressional intent is further indicated by another section of the Technical Changes Act of 1949, which is unnecessary under present law and has been deleted, but which is nevertheless helpful in determining the intended scope of the exception contained in

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opinion, it would be beyond the power of the Treasury to alleviate the full effects of this opinion, and legislation is necessary to accomplish this.

The operation of the amendment made by this section may be illustrated by the following example: A, in 1928, transferred property in trust retaining a life estate and giving the remainder indefeasibly to B and his heirs. Since the transfer was made before March 4, 1931, and *the only right or interest retained by the decedent in the property consists of an estate for his life*, the transfer is not "intended to take effect in possession or enjoyment at or after his death" within the meaning of section 811(c) as amended by this section of the bill. Hence, the property is not includible in the gross estate unless the transfer was made in *contemplation of death or unless the property falls within some other subdivision of section 811.*

The amendment made to section 811(c) by this section of the bill does not, however, similarly change the estate-tax treatment of a transfer made before March 4, 1931, in case the decedent retained both a life estate and some other right or interest in the transferred property. Thus, assume that A, in 1928, transferred property in trust retaining a life estate and giving the remainder to B if living at A's death. In this case, since the property will revert to A by operation of law if he should survive B, A has retained more than a life estate. Accordingly, this section of the bill does not relieve A's estate from liability under the estate tax with respect to this property." (emphasis added.) S.Rep. No. 831, 71st Cong., 1st Sess., pp. 293-94.

[9] See footnote 7, *supra*.

§ 2036(b). The 1949 Act, unlike the present law, did not provide for the blanket exclusion of all pre-March 4, 1931, transfers regardless of the settlor's date of death; it was not until 1953 that this provision was enacted. Technical Changes Act of 1953, § 207, ch. 512, 67 Stat. 615. Rather, under § 7 of the 1949 Act, the corpus of a pre-March 4, 1931, trust was excluded from the settlor's gross estate only if he died before January 1, 1950. However, in § 8 a transitional period was provided for by allowing those persons who had created a trust with a reserved life estate before March 4, 1931, to release their life estate during 1949 or 1950 without paying a gift tax thereon and by providing that such a release would not be deemed to have been made in contemplation of death.

For present purposes, the significance of § 8 is that it contained an exception clause specifically excluding revocable trusts from its operation. Thus, Congress again distinguished between revocable and irrevocable trusts and indicated that it contemplated that only the latter were to be excluded in the valuation of a settlor's gross estate. Otherwise, it would have opened the same escape route provided in § 8 to settlors of revocable trusts as it did to settlors of irrevocable trusts.[10]

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[10] In his dissenting opinion in *Smith* v. *United States*, 139 F. S. 305, 310 (Ct. Claims 1956), Judge Laramore relied upon the exception clause to § 8 to support the view, contrary to our own, that Congress intended all pre-March 4, 1931, trusts to be excluded from the retention-of-income section. Judge Laramore reasoned that by virtue of the exception clause, revocable transfers would be subject to the estate tax if the settlor's power to revoke were released in contemplation of death, and this proviso would have no meaning if Congress intended that revocable transfers were to be included in the settlor's gross estate "regardless of whether the power were released in contemplation of death." 139 F. S., at 311. Judge Laramore was mistaken in concluding that § 8 spoke to the release of the power of revocation; it was concerned only with the release of the life estate. However, a more fundamental fallacy in his reasoning in that a negative inference can properly be drawn from § 8 only in the situation where there has in fact been a release. Of course, § 8 does imply that if the life estate is released and this release is not made in contemplation of death, the corpus of the

In light of this overwhelming evidence that Congress intended in § 2036(b) to exclude only irrevocable pre-March 4, 1931, trusts from the operation of § 2036(a), we conclude that the word "transfer" as used in § 2036(b) means "became irrevocable." So to construe it accomplishes the Congressional purpose; that purpose, in this instance, must prevail over the literal reading of the word. *Markham* v. *Cabell*, 326 U.S. 404, 409 (1945); *Cawley* v. *United States*, 272 F.2d 443, 445 (2 Cir. 1959).

The decision of the Tax Court is

REVERSED.

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trust will not be included in the settlor's gross estate. But as a matter of logic § 8 does not necessarily imply that where the life estate is retained as of the date of the settlor's death the corpus of the trust is excludable, and as a matter of fact it could not so imply since under § 7 of the 1949 Act, regardless of the nature of the trust, if the life estate were retained after December 31, 1949, and on the date of the settlor's death, the corpus of the trust would be included in his gross estate.

U.S. COURT OF APPEALS JUDGMENT

No. 12,081

[Caption omitted]

On Petition to Review the Decision of The Tax Court of the United States.

This cause came on to be heard on the transcript of the record from The Tax Court of the United States, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the decision of the said The Tax Court of the United States, in this cause, be, and the same is hereby, reversed.

/s/ Samuel W. Phillips
Clerk

Filed September 20, 1968
SAMUEL W. PHILLIPS, Clerk

A True Copy, Teste:
Samuel W. Phillips, Clerk
By /s/ Margaret M. Walton
Deputy Clerk

[SEAL]

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 714

ESTATE OF ELEANOR BUCHANAN TALBOTT, DECEASED, BRYAN CARVER, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. A11-A22) is not as yet officially reported. The opinion of the Tax Court (Pet. A1–A10) is reported in 48 T.C. 271.

JURISDICTION

The judgment of the Court of Appeals was entered on September 20, 1968. (Pet. A23.) The petition for a writ of certiorari was filed on November 5, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

327-260—68

QUESTION PRESENTED

Whether the corpus of a revocable trust created by the decedent prior to March 4, 1931, was excludable from her gross estate under Section 2036(b) of the Internal Revenue Code of 1954 as a pre-1931 "transfer" of property with a retained life estate, notwithstanding the fact that the transfer remained revocable in favor of the decedent until after 1931.

STATUTES INVOLVED

Section 2036 of the Internal Revenue Code of 1954, 26 U.S.C. 2036, is set forth in the petition, at pp. 2–3.

STATEMENT

Petitioner is the executor of the Estate of Eleanor Buchanan Talbott (decedent), who died on December 30, 1962. (Pet. A1, A12.) On July 5, 1923, decedent executed a trust under the terms of which the net income was payable to herself and her husband during their joint lives, and to the survivor for life. After the death of both, the corpus of the trust was to be paid over to four named beneficiaries or their survivors. The trust agreement provided that the decedent could, during her husband's life and with his consent, modify, alter, or revoke the trust in whole or in part; and that the surviving life income beneficiary could do so with the consent of Charles F. Talbott, one of the remaindermen. On October 3, 1932, and on April 10, 1933, the decedent with the consent of her husband revoked the trust in part. Decedent's husband died on November 15, 1935. Charles F. Talbott died on March 6, 1937. (Pet. A1–A4, A12.)

In 1943 decedent executed an instrument directing the manner in which the trustee was to apportion funds received from the distribution of specified bonds between the trust income and principal. In 1964, the Supreme Court of the State of New York entered a final accounting order which provided, *inter alia*, that the decedent had no authority to revoke the trust to the extent attempted in 1943. The trust was still in existence at the date of the decedent's death. (Pet. A4–A5, A12–A13.)

In the federal estate tax return filed on behalf of the decedent, petitioner excluded the value of the trust corpus. The Commissioner determined that the corpus was includible in the estate on the ground that the trust was an interest which decedent had transferred while retaining a life estate, which, under Section 2036(a) of the Internal Revenue Code of 1954, must be included in the estate. In a resulting suit for redetermination the Tax Court ruled for petitioner, holding that the trust came within the exception to section 2036(a), set forth in section 2036(b), for any "transfer made before March 4, 1931" (Pet. A1–A10). The court of appeals reversed, sustaining the Commissioner's position that section 2036(b) applies only to transfers that became complete and irrevocable before March 4, 1931. (Pet. A11–A20).[1]

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[1] A preliminary issue litigated below was whether the trust was to be treated as irrevocable because the decedent's power to amend or revoke it was exercisable only with the consent of her husband during their joint lives and thereafter with the consent of one of the remainderman. This issue turned on whether under the particular terms of the trust the husband

ARGUMENT

The decision below is correct and there is no direct conflict of decisions. Moreover, the question presented is an extremely narrow one, which can arise only with respect to a particular type of trust created more than 37 years ago, *i.e.*, a pre-1931 revocable transfer with a retained life estate, and no similar cases are now pending, and very few, if any, may be reasonably anticipated.

1. The legislative history and judicial background of the predecessor of section 2036(b) of the 1954 Code require the conclusion that the exception carved out in that section in favor of pre-1931 transfers with a retained life estate was not designed to cover revocable transfers, and applied only to those pre-1931 transfers which were complete and irrevocable on that date. Section 2036(a) of the Internal Revenue Code of 1954 provides that as a general rule the value of a decedent's gross estate shall include for federal estate tax purposes property transferred by gift during his lifetime if he retained the income for life. However, section 2036(b) provides that section 2036(a) "shall not apply to a transfer made before March 4, 1931." The narrow question presented in this case is whether the establishment of the trust by decedent was a completed transfer within the meaning of section 2036(b) when the legal title to the corpus passed from the settlor to the trust in 1923 and 1929, or did not become so until the remainder interest in the trust became irrevocable, which was after March 4, 1931.

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had a substantial adverse interest in the trust corpus, was decided by both courts below in the Commissioner's favor (Pet. A6–A7, A13–A15), and is not presented here.

The initial predecessor of section 2036(a) became law by Joint Resolution of Congress on March 3, 1931, c. 454, 46 Stat. 1516, which amended section 302(c) of the Revenue Act of 1926, c. 27, 44 Stat. 9, relating to transfers in contemplation of or taking effect at death. The purpose was to set aside *Burnet* v. *Northern Trust Co.*, 283 U.S. 782, and related cases, where this Court held that the retention of a life interest in an irrevocable trust was not sufficient to bring the corpus of the trust into the settlor's gross estate. Following the passage of the Joint Resolution, the corpus of an irrevocable trust in which the settlor retained a life interest was includible in the settlor's gross estate. However, the Joint Resolution did not affect trusts which were irrevocable as of the date of its passage. See *Hassett* v. *Welch*, 303 U.S. 303.

Such was the law until 1949, when this Court in *Commissioner* v. *Estate of Church*, 335 U.S. 632, 660, 662, overruled *May* v. *Heiner*, 281 U.S. 238, on which the *Northern Trust* decision had been based, mooted the retroactivity question decided by *Hassett* v. *Welch*, *supra*, and held that the retention of income for life was enough to make a trust includible in the estate under the broad provisions of the Code that dealt with transfers intended to take effect at death. After the *Church* decision, Congress, in sections 7 and 8 of the Technical Changes Act of 1949, Act of October 25, 1949, c. 720, 63 Stat. 891, 894–896, granted some relief to those who had relied upon *May* v. *Heiner*, *supra*.[2]

[2] Under this Act, settlors of trusts who retained life income interests were permitted during 1949 and 1950 to surrender their life interests free of gift and estate tax, provided that the value of the corpus would not have been included in the settlors' estates

See S. Rep. No. 831, 81st Cong., 1st Sess., pp. 7–8. That Act also amended section 811(c) of the 1939 Code so as to separate the retention-of-income provisions from the provisions relating to transfers taking effect at death; and the retention-of-income provisions were placed in section 811(c)(1)(B), while the provisions relative to transfers taking effect at death were treated in other subdivisions of the statute. The retention-of-income provisions of section 811(c)(1)(B) were made inapplicable to transfers made prior to March 4, 1931, in the case of decedents dying prior to January 1, 1950. The latter restriction was eliminated by section 208 of the Technical Changes Act of 1953, c. 512, 67 Stat. 615, thus making section 811(c)(1)(B) inapplicable to transfers made prior to March 4, 1931, regardless of when the settlor died. Section 811(c)(1)(B) as amended was carried forward into section 2036 of the 1954 Code without substantial change.

As the court of appeals pointed out, the facts that *May* v. *Heiner, supra,* and *Commissioner* v. *Estate of Church, supra,* had to do only with irrevocable trusts (Pet. A18–A19) and that the legislative history shows an intent to deal only with irrevocable trusts (Pet. A20–A21) constitute (Pet. A22) "overwhelming evidence that Congress intended in § 2036(b) to exclude only irrevocable pre-March 4, 1931, trusts from the operation of § 2036(a)." The resulting conclusion (*ibid.*) "that the word 'transfer' as used in

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by reason of the Joint Resolution of March 3, 1931, or section 811(d) of the 1939 Code (now section 2038 of the 1954 Code) if the settlor died on October 7, 1949.

§ 2036(b) means 'became irrevocable'," is in accord with that of the Court of Claims in *Smith* v. *United States,* 139 F. Supp. 305. It is also required by numerous decisions of this Court that a "transfer" is not deemed to have occurred if the transferor retains a power to revoke the transfer. *Reinecke* v. *Northern Trust Co.,* 278 U.S. 339; *Corliss* v. *Bowers,* 281 U.S. 376; *Burnet* v. *Guggenheim,* 288 U.S. 280; *Porter* v. *Commissioner,* 288 U.S. 436; *Reinecke* v. *Smith,* 289 U.S. 172; *Estate of Sanford* v. *Commissioner,* 308 U.S. 39.

2. There is no substance in petitioner's contention (Pet. 8–10) that the term "transfer" appearing in section 2036(b) on its face has reference to revocable as well as irrevocable transfers. To begin with, it is elementary that for federal tax purposes a "transfer" of property ordinarily denotes a complete and permanent divestiture of economic benefits of ownership, not the transitory passage of legal title. *E.g., Reinecke* v. *Northern Trust Co., supra; Burnet* v. *Guggenheim, supra.* Furthermore, it is a familiar rule of statutory construction that the language of a statute, however clear and plain its meaning upon superficial examination, is to be read in the light of its legislative history and related statutory provisions, so as to "give effect to the intent of Congress". *United States* v. *American Trucking Ass'ns,* 310 U.S. 534, 542–544; see, also, *United States* v. *Dickerson,* 310 U.S. 554, 561–562; *Association of Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.,* 348 U.S. 437, 444; *Harrison* v. *Northern Trust Co.,* 317 U.S. 476, 479. As the court below took pains to point out (Pet. A15–A22),

the word "transfer" as used in section 2036(b), read in its statutory context and in the light of its legislative history and the judicial background, unquestionably has reference only to an *irrevocable* pre-1931 transfer in trust with a retained life estate.

3. The cases upon which petitioner relies in asserting a conflict (Pet. 5–7) are factually distinguishable. As the court below observed, both *Commissioner* v. *Ridgeway's Estate,* 291 F. 2d 257 (C.A. 3) and *Commissioner* v. *Canfield's Estate,* 306 F. 2d 1 (C.A. 2d), unlike *Smith* and the instant case, involved transfers which were irrevocable on March 4, 1931, "in the sense that the settlor could revoke the trust only for the benefit of others but not for himself" (Pet. A16–A17); indeed, the courts of appeals there distinguished those cases from *Smith* on that ground. Since here, as in *Smith,* the decedent could revoke in favor of herself, the instant case is similarly distinguishable from *Ridgeway* and *Canfield.* We recognize that both the Second and Third Circuits did, as petitioner points out (Pet. 6–8), suggest that, contrary to the decision here, they would hold that a trust that remained revocable after March 4, 1931, would nevertheless come within section 2036(b). The fact remains, nevertheless, that no court of appeals has so ruled, and the rationale of both the court below and the Court of Claims suggests that they would agree with the Second and Third Circuits in the case of a trust that became irrevocable by March 4, 1931; at the very least they have not decided otherwise.

4. In any event, the question presented lacks sufficient importance to warrant review by this Court. The issue relates to a limited and non-recurring type of transfer in trust: revocable trusts with a retained life estate created before March 4, 1931, and which remained revocable until after that date. Neither the Internal Revenue Service nor the Department of Justice is aware of any pending matter that raises the issue of the instant case. Thus, through the passage of time, the question has ceased to have any practical importance in the administration of the revenue laws.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

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ESTATE OF ELEANOR BUCHANAN TALBOTT, DEC.,
BRYAN CARVER, EXECUTOR,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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PETITIONER'S REPLY BRIEF TO THE BRIEF OF RESPONDENT IN OPPOSITION

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OPINION BELOW

As stated in the petition. (Pet. 1.)

JURISDICTION

As stated in the petition. (Pet. 1.)

QUESTION PRESENTED

Respondent states that the question is whether the trust is excludible under Sec. 2036(b), IRC 1954, "notwith-

standing the fact that the transfer remained revocable in favor of decedent until after 1931." (Br. 2.)

Petitioner submits that there is no warrant for the quoted statement, either from the facts or from the language of the trust indenture itself.

The power of revocation was not a power which decedent could exercise alone, or exercise with the *consent* of her husband, or after his death, with the *consent* of the remainderman. The power was exercisable only by the *joint action* of decedent and her husband, or by the *joint action* of decedent and the remainderman after her husband's death. Moreover, the instrument of revocation was required to have the same formality as a deed of real property for record in the State of New York and to "direct the disposition to be made of the trust fund or the portion hereof affected by such revocation." (Pet. A4.) There was no requirement that the trust fund be returned to decedent in the event of revocation. Her husband and, after his death, the remainderman had equal power with decedent to direct the disposition of the trust fund. This unequivocal language of the trust indenture precludes the conclusion that "the transfer remained revocable in favor of decedent until after 1931."

ARGUMENT

1. Respondent devotes the major part of his brief in opposition to an argument that the decision of the court below is correct, which petitioner understands would be the question for this Court to decide only in the event a writ of certiorari is granted. (Br. 4-8.) In view of respondent's contention, petitioner deems it proper to reply briefly to his argument regarding the correctness of the decision below.

No question arises as to whether decedent made a transfer at death—the only question being the date of the transfer in trust during her lifetime. This turns on—

Whether the word "transfer" has the same meaning in Subsection (b) as it has in Subsection (a) of Sec. 2036, IRC 1954. (Pet. 2, 3 for complete section.)

The Second and the Third Circuits and the Tax Court uniformly have held that the word "transfer" has the same meaning in both subsections. (Pet. 5, 6.) The court below held to the contrary, thus giving rise to the conflict. (Pet. 4, 5, A11, A18, A21.) Petitioner submits that the decision below is wrong.

Subsection (a) is captioned "General Rule." All courts agree that the General Rule includes both revocable and irrevocable transfers. Subsection (b) provides "This section shall not apply to a transfer made before March 4, 1931." The words "this section" necessarily mean Sec. 2036, which includes Subsection (a), the General Rule.

To clinch the Congressional intent that revocable and irrevocable transfers are embraced by the word "transfer" in Subsection (b), this subsection is captioned "Limitation on Application of General Rule." If the General Rule in Subsection (a) includes both revocable and irrevocable transfers, and if the General Rules is not applicable to transfers made before March 4, 1931, then it must follow that any transfer, whether revocable or irrevocable, made before March 4, 1931 is excluded from the decedent's gross estate under Subsection (b).

2. Where the language of a statute is clear and unambiguous, as Sec. 2036, this Court has held that there is no need to resort to legislative history. (Pet. 8, 9.) Moreover the Second and the Third Circuits and the Tax Court have held that legislative history does not support the conclusion that the word "transfer" has a different meaning in Subsection (b) from what it has in Subsection (a), as respondent argues, and as the court below held. (Pet. 5, 8, 9, A7-A9.)

Respondent's argument that all three *per curiam* decisions decided by this Court on March 2, 1931 upon the

authority of *May* v. *Heiner*, 281 U. S. 238, 74 L. Ed. 826, 8 AFTR 10904 (1930), were irrevocable trusts, in support of his contention that the March 3, 1931 Joint Resolution and subsequent remedial legislation, including Sec. 2036(b) of the present Code, were applicable only to irrevocable trusts, is erroneous. (Br. 5.)

One of these *per curiam* decisions, *McCormick* v. *Burnett*, 283 U. S. 784, 75 L. Ed. 1413, 9 AFTR 1000 (1931), *rev'g Comm.* v. *McCormick*, (CA Seventh, 1930), 43 F 2d 277, 9 AFTR 64), involved a trust in which the settlor retained income for life and also reserved the *power to terminate the trust* at any time by delivering to the trustee an instrument signed by herself and by one or more of her three children, each of whom was entitled to receive one-third of the income after the settlor's death and also entitled to dispose by will of his share of the income after his own death. *Upon termination of the trust, the trust fund was to be payable to the settlor.* (See 43 F 2d at pp. 277, 278; 9 AFTR at pp. 64, 65.) This decision clearly supports the holdings of the Second and Third Circuits and the Tax Court that the remedial legislation beginning with the Joint Resolution of March 3, 1931 and ending with Sec. 2036(b) of the present Code was intended to apply to revocable and to irrevocable transfers.

3. As stated by respondent, the facts in the various cases decided by the different courts have not been the same. (Br. 8.)

In the *Canfield*, *Brenner* and *Battle* cases, the settlor retained the income for life and also a power of testamentary disposition of the corpus and surrendered the power after March 3, 1931. (Pet. 5, 6.)

In the *Ridgway* and *Carlton* cases the settlor retained the income for life and a power to change the terms of distribution of the income or principal and relinquished the power after March 3, 1931. (Pet. 6.)

In the *Smith* case, the settlor's husband, who was trustee without any interest in the income or principal, had the power to revoke the trust and died after 1931, thus terminating the power. (Br. 7.)

In the *Studebaker* case, the settlor alone had the power to revoke the trust and surrendered the power after 1931. (Pet. 5.)

In the instant case, the trust was revocable only through the exercise of a joint power, which ended not by any action on the part of the decedent, but solely as a result of the death of the other owner of the joint power.

Despite these factual differences, the sole issue in all of these cases was a legal question—whether the word "transfer" in the limitation provision which is applicable to transfers before March 4, 1931, has the same meaning as the word "transfer" in the general rule, which is applicable to transfers after March 3, 1931.

4. Respondent states that no other case is known which involves an issue relating to "revocable trusts with a retained life estate created before March 4, 1931, and which remained revocable until after that date." (Br. 9.) We have shown that the same legal issue has arisen in cases involving powers of testamentary appointment, powers to change the terms of distribution of the income and principal, and powers to revoke by the settlor alone or by a person without any interest in the income or the principal. Respondent did not state whether any cases of the latter type were known—cases which involve the same legal issue that is involved in the instant case.

It would be idle speculation to conjecture how many cases may arise in the future involving the question of whether the word "transfer" has the same meaning in the Limitation Provision in Subsection (b) as it has in the General Rule in Subsection (a) of Sec. 2036 of the Code. There is no assurance that none will arise, and if

any should, the courts below will be confronted with the same conflict that exists now.

Petitioner submits that the petition for a writ of certiorari should be granted or denied on the grounds stated in the petition and not on mere surmise that no cases involving the meaning of the word "transfer" in Subsection (b) of Sec. 2036, IRC 1954, will arise in the future.

CONCLUSION

The petition for a writ of certiorari should be granted in order to resolve the conflict between the Second and Third Circuits and the court below.

Respectfully submitted,

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